

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 30, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 97-1652

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

IN THE INTEREST OF NICHOLAS A.G., A PERSON UNDER
THE AGE OF 17:
STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

NICHOLAS A.G.,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: EARL J. MCMAHON, Judge. *Affirmed.*

VERGERONT, J.¹ Nicholas A.G., date of birth November 12, 1982, appeals from a dispositional order transferring him to the Wisconsin

¹ This appeal is decided by one judge pursuant to § 752.31(2)(e), STATS.

Department of Corrections for a period of one year, with reception to be at Ethan Allen School for Boys. This order followed a petition for revision of a permanency plan and placement in Case No. 95 JV 657 and a no contest plea to a petition of delinquency filed in Case No. 97 JV 270. In Case No 95 JV 657, Nicholas pleaded no contest to charges of burglary contrary to § 943.10(1)(a), STATS. That delinquency petition alleged that on or about August 12, 1995, Nicholas, with his brother, entered his uncle's apartment without his uncle's permission, after taking the key from his mother's key ring, and stole his uncle's marijuana. In Case No. 97 JV 270, Nicholas pleaded no contest to charges that he intentionally and knowingly accompanied, as a passenger, a person who was driving a motor vehicle without the owner's consent contrary to § 943.23(4m), STATS., and resisted an officer who was attempting to apprehend a suspect contrary to § 946.41(1), STATS.

On appeal Nicholas contends that there was no evidence submitted to the court to support its findings and the court erroneously exercised its discretion in ordering correctional placement as a disposition. We conclude that there was evidence to support the court's findings and that the court did not erroneously exercise its discretion. We therefore affirm.

BACKGROUND

After Nicholas's no contest plea in Case No 95 JV 657, the court entered an order on September 18, 1995, placing him in his parents' home under the supervision of Dane County Department of Human Services (DCDHS) for one year, with educational programming. After a petition for revision/change of placement was filed because of suspensions and truancy at school, noncompliance at home, and family problems at home contributing to his dysfunction, the court

ordered placement in a foster home with certain conditions, including cooperation with AODA assessment and psychiatric evaluation and cooperation with urinalysis (UA). On July 26, 1996, the court ordered supervision over Nicholas to be extended for one year and ordered twenty days of detention, stayed, as a sanction for violating the court order by not following the rules of the foster home. On November 25, 1996, there was another sanction hearing at which the court authorized but stayed the imposition of twenty more days in detention for violation of the court order because of the results of UA in September and October.

The incident underlying the delinquency petition filed in Case No. 97 JV 270 occurred on March 6, 1997, while Nicholas was on the run from his foster home. The details of the incident as stated in the petition were that Nicholas was picked up by a friend who was driving a car stolen from Pizza Hut and they proceeded to pick up others. The driver told everyone in the vehicle the car was stolen. The driver, upon seeing a law enforcement officer, accelerated through a stop sign, collided with one vehicle, got hit by another vehicle and continued driving recklessly at approximately eighty miles per hour with the officers in pursuit. Eventually the car crashed into a fence. According to the driver, the group planned to drive to Dubuque, Iowa. Also, the driver stated that when he started to pick up speed, everyone in the car yelled, "go, go, go." When the car crashed, Nicholas ran from the car, in spite of being ordered by one of the uniformed officers, who identified himself, to stop. Nicholas was caught several blocks away.

Nicholas was held in the juvenile detention center until the plea hearing on March 20. Meanwhile, a petition for revision in Case No 95 JV 657 was filed, citing as grounds the new charges, going AWOL from his foster home, and UAs positive for THC. After Nicholas pleaded no contest to the new petition,

the court entered an interim order that he be placed at Northwest Passage Assessment Center, with placement at Northwest Passage pending an opening in the Assessment Center. Nicholas was ordered to cooperate with a complete psychiatric evaluation, including medication review. Upon completion of that assessment, Nicholas returned to court on May 2, 1997, and, since the disposition hearing was set for May 14, 1997, he was temporarily released to the foster home where he had previously resided.

The hearing on May 14, 1997, was for both a disposition in Case No. 97 JV 270 and on a petition for revision in Case No. 95 JV 657. The assistant district attorney (ADA) began by summarizing the prior proceedings in both cases and the contents of the DCDHS court report that was submitted to the court for the hearing. The report referred to and attached an earlier court report and the assessment from Northwest Passage. As the ADA summarized these, she commented on them, emphasizing the numerous programs and interventions that had been used or tried and Nicholas's non-compliant behavior in the foster home, at school and, more recently, in detention.

The assessment from Northwest Passage, the ADA pointed out, stated that Nicholas had little motivation for change and limited ability to empathize with others, a high level of denial with regard to personal and family problems, unpredictable and irritable moods, high levels of resentment, bitterness and poor anger control. The diagnosis was conduct disorder, depression and drug dependence. The recommendation from Northwest Passage was for short-term residential treatment that would provide individual and group therapy, chemical health treatment, intense skill building and behavioral modification in a highly structured setting, followed by treatment foster care, which could include return to his previous foster parents, and a number of community and treatment services to

supplement that foster care. The ADA agreed with the recommendation insofar as the initial placement was out of home, but she disagreed that the residential treatment should be short term. She argued that a long-term stay was needed to effectively address Nicholas's problems.

The ADA also summarized the recommendation in the most recent court report, prepared by the DCDHS social worker who had been working with Nicholas. This recommendation differed from that of Northwest Passage. DCDHS recommended that Nicholas immediately return to his foster home, with certain conditions including twenty-four-hour adult supervision; attend an AODA recovery program and individual therapy; cooperate with the employment arranged for him; attend school programs with no behavior problems; cooperate with random UA; and cooperate with the DCDHS social worker and with his worker from Community Adolescent Programs (CAP). The DCDHS report stated that residential treatment would probably be ineffective because Nicholas was unmotivated at Northwest Passage and he had developed a relationship with his foster parents, which was important to build on.

The ADA argued against DCDHS's recommendation. She went over various components of that recommendation, pointing out that they had been provided to Nicholas previously and had been unsuccessful.

Nicholas presented three witnesses, the CAP worker, his mother and his foster mother. They all supported the DCDHS recommendation. The DCDHS social worker also testified in support of the recommendation. All four testified that Nicholas's behavior improved significantly in the last twelve days since he went back to his foster parents. They all expressed the view, in various ways, that this was a genuine change in motivation on Nicholas's part and attributed it to his

experience in detention, his approval of the DCDHS recommendations, and to his understanding that if he did not make it work, he would be placed outside the community. On cross-examination, they all acknowledged the services and programs that had been provided to Nicholas previously and his failure to respond to them. They testified that, in addition to Nicholas's improved motivation, there were improvements and differences in DCDHS's recommended plan compared to the previous plans: Nicholas's individual therapist would be changed, the goal was no longer to transition him back home but to keep him in foster care; there would be fewer visits to his parents' home; there would be twenty-four-hour adult supervision (there already had been during the twelve days at his foster parents); and the foster home would be wired electronically for security to make sure Nicholas did not leave unsupervised (this would happen if the court ordered placement with the foster parents).

In its decision, the trial court stated that it did not agree with the position of either the ADA or Nicholas's attorney. It considered that the witnesses were making excuses for Nicholas's bad conduct. It viewed the charges of operating a motor vehicle without permission (as a passenger), and resisting an officer to be serious offenses and not adequately addressed in the recommendations. The trial court considered Nicholas's behavior to demonstrate that he was not going to follow the rules or assume responsibility and noted that Nicholas had received extensive services over the past two years, which did not seem to have done any good. The court stated its intention to "break the cycle." The court found that "the crimes for which [he had] been found guilty would be punishable by a prison sentence in excess of six months if they were done by an adult." The court also found that Nicholas was a danger to the public and that a

restrictive custodial setting was necessary for his best interests and the public's best interests. The court therefore ordered a correctional placement for one year.

DISCUSSION

The dispositional hearing was conducted under the recently enacted "Juvenile Justice Code," Chapter 939.² We summarize here the statutory provisions pertinent to this appeal. Before each disposition, the court shall require a designated agency to submit a report, the contents of which are specified by statute and include a recommendation, plan of rehabilitation or treatment, and care for the juvenile. Section 938.33, STATS. At the dispositional hearing, any party may present testimony relevant to the issue of disposition and may make alternative dispositional recommendations. Section 938.335, STATS.

In deciding the disposition for a juvenile who has been adjudicated delinquent, "the court shall consider the seriousness of the act for which the juvenile is adjudicated delinquent and may consider any other delinquent act that is read into the record and dismissed at the time of adjudication...." Section 938.34, STATS. The court "... shall decide on a placement and treatment finding based on evidence submitted to the court. The disposition shall employ those means necessary to promote the objectives specified in s. 938.01...."³

² Chapter 938, STATS., was enacted by 1995 Act 77.

³ Section 938.01(2), STATS., provides:

It is the intent of the legislature to promote a juvenile justice system capable of dealing with the problem of juvenile delinquency, a system which will protect the community, impose accountability for violations of law and equip juvenile offenders with competencies to live responsibly and productively. To effectuate this intent, the legislature declares the following to be equally important purposes of this chapter:

(continued)

Section 938.355(1), STATS. “In addition to the order, the court shall make written findings of fact and conclusions of law based on the evidence presented to the court to support the disposition ordered” Section 938.355(2)(a), STATS. A court may order placement of a juvenile twelve years of age or over in a secured correctional facility only if: (a) the juvenile has been found to be delinquent for the commission of an act which, if committed by an adult, would be punishable by a sentence of six months or more, and (b) the juvenile has been found to be a danger to the public and in need of a restrictive custodial setting. Section 938.34(4m)(a) and (b), STATS.

(a) To protect citizens from juvenile crime.

(b) To hold each juvenile offender directly accountable for his or her acts.

(c) To provide an individualized assessment of each alleged and adjudicated delinquent juvenile, in order to prevent further delinquent behavior through the development of competency in the juvenile offender, so that he or she is more capable of living productively and responsibly in the community.

(d) To provide due process through which each juvenile offender and all other interested parties are assured fair hearings, during which constitutional and other legal rights are recognized and enforced.

(e) To divert juveniles from the juvenile justice system through early intervention as warranted, when consistent with the protection of the public.

(f) To respond to a juvenile offender's needs for care and treatment, consistent with the prevention of delinquency, each juvenile's best interest and protection of the public, by allowing the judge to utilize the most effective dispositional option.

(g) To ensure that victims and witnesses of acts committed by juveniles that result in proceedings under this chapter are, consistent with the provisions of this chapter and the Wisconsin constitution, afforded the same rights as victims and witnesses of crimes committed by adults, and are treated with dignity, respect, courtesy and sensitivity throughout such proceedings.

The parties agree that the disposition is committed to the trial court's discretion. In reviewing a discretionary determination, we look to see whether the trial court considered the facts of record or reasonably derived inferences from those, applied the proper legal standards, and, using a rational process, arrived at a conclusion that a reasonable judge could reach. *Burkes v. Hales*, 165 Wis.2d 585, 590-91, 478 N.W.2d 37, 39 (Ct. App. 1991). If the trial court has done this, we affirm the decision even if it is not one we ourselves would reach. *Id.* The court's explanation for its decision need not be lengthy. *Id.* It is enough that the trial court indicates to the reviewing court that the trial court undertook a reasonable inquiry and examination of the facts and that there is a reasonable basis for its determination. *Id.*

Nicholas argues that there was no evidence presented at the disposition hearing that supports the finding that he presents a danger to the community or that a restrictive custodial setting is necessary to protect his or the public's interests. Nicholas contends that the State presented no evidence, that the only evidence at the hearing was introduced by Nicholas, and that none of this evidence supported correctional placement as a disposition.

We note at the outset that the significant point is not who presented the evidence, but whether it supports the trial court's disposition. We agree with Nicholas that the ADA's comments are not evidence. However, if Nicholas means that the trial court could not consider the record of prior proceedings in the two cases before the court without a motion that it take judicial notice, or could not consider the DCDHS report to the court unless it was moved and accepted into evidence, we do not agree with those propositions. Neither common law nor statutory rules of evidence are binding at a disposition hearing or a hearing on changes in placement or revisions of disposition orders. Section 938.299(4)(b),

STATS. The court report is required by statute, and this court report specifically referred to the court-ordered Northwest Passage assessment and an attached court report prepared for a prior proceeding.

Certainly if Nicholas objected to any information or diagnoses contained in the court report or attachment, he was free to make that known to the court, to argue against consideration of those portions or to present evidence to counter those. However, it does not appear that any information about Nicholas's background, past conduct, past services and treatment, responses to those, or needs for educational services and psychiatric and AODA treatment were disputed. Indeed, in their testimony, Nicholas's witnesses and the social worker who prepared the court report repeated and relied on information contained in the report and in the Northwest Passage assessment. They disagreed with the conclusions and recommendation of the Northwest Passage assessment but not the background section or the summary of identified issues and needs. And, when the ADA asked the CAP worker on cross-examination whether all the services she mentioned in her opening comments had been previously provided or offered to Nicholas, he agreed.

We conclude that the court could properly consider the court report, the Northwest Passage assessment, the earlier court report, and the prior proceedings concerning Nicholas in these two cases, as well as the testimony presented at the hearing. We also conclude that the court-ordered correctional placement was supported by this record and reasonable inferences from this record.

The court took into account the services and treatment programs that had been provided to Nicholas since the first delinquency petition and the fact that

these had not resulted in improved behavior but, in fact, his behavior had deteriorated, as evidenced by the second petition and his no contest plea to that. The court also heard testimony about the lack of motivation and cooperation Nicholas demonstrated after the second petition. It is true that four witnesses testified to Nicholas's improved motivation and conduct in the last twelve days. However, the court could reasonably determine, based on the pattern of Nicholas's conduct over the time period up to those twelve days—almost two years—that the twelve days did not represent the change in behavior and attitude necessary to make either the ADA's recommendation or Nicholas and his witnesses' recommendation appropriate.

The record supported the court's finding that Nicholas was a danger to the public and that a restrictive custodial setting was necessary. The most recent offense, including the fact that he was urging on the driver of the vehicle in a high-speed chase, is evidence of conduct that is dangerous to others. The Northwest Passage assessment noted poor anger control and disruptive behavioral disorder. Also significant is his need not only for twenty-four-hour adult supervision, but also for electronic security devices at the foster home to make sure he does not leave the home unsupervised. Nicholas argues that this shows that the public would be protected while he remained in the community. But it is also reasonable to infer from this evidence that Nicholas's inability at this time to follow the rules necessary for him to live in the community is such that nothing but a restrictive custodial setting will ensure the public's protection.

In addition, Nicholas argues that the two most recent offenses were misdemeanors, not felonies, and that the court's statement that "the crimes for which [he has] been found guilty would be punishable by a prison sentence in excess of six months if they were done by an adult" is inaccurate. We understand

Nicholas to mean that the statement was incorrect because, although the two recent offenses are punishable by up to nine months imprisonment, *see* §§ 943.23(4m), 946.41(1) and 939.51(3), STATS., the place of imprisonment for a sentence of less than one year is the county jail, not a Wisconsin state prison. *See* § 973.02, STATS. The requisite finding for a corrections placement under § 938.34(4m)(a), STATS., is an adjudgment of delinquency for an act punishable, for an adult, by “a sentence of 6 months or more.” The two recent offenses each meet this criteria, and Nicholas does not suggest otherwise. We interpret the court’s use of “prison sentence” to mean “imprisonment.” We do not interpret this as signifying a misunderstanding over the classification of the offenses, since, by definition, sentences of more than six months’ imprisonment but less than one year are not served in state prisons. *See* § 973.02. The imprecise use of the word “prison sentence” does not persuade us that the trial court did not properly exercise its discretion, as Nicholas contends. The record supports the requisite finding under § 938.34(4m)(a), and we see no indication that the court did not intend to make this finding.

There is no doubt that the court considered the two recent offenses to be serious ones. That is a reasonable assessment, and a proper factor for the court to consider. *See* § 938.34, STATS. We also observe that Nicholas was before the court for a revision of his placement in Case No 95 JV 657 and that offense, burglary, is a Class C felony, punishable by a maximum term of imprisonment of ten years or a fine not to exceed \$10,000 or both. Sections 939.50(3)(c) and 943.10(1)(a), STATS.

Although the court did not adopt the placement advanced by either party, or the unanimous recommendation of the witnesses, that, in itself, does not show an erroneous exercise of discretion. And although the court’s explanation is

not lengthy, it is sufficient to permit us to determine that it properly exercised its discretion. The court considered the record, including the testimony of Nicholas's witnesses. It reasoned that something was needed to "break the cycle" and that neither of the recommendations would do that because they were too similar to that which had already been tried without success. It applied the proper legal standards. Although another judge might have ordered a different disposition, we are persuaded that this one was reasonable.

By the Court.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.

